

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEFFREY HERSON, et al.,

Plaintiffs,

No. C 09-2516 PJH

v.

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION**

CITY OF RICHMOND,

Defendant.

Plaintiffs' motion for preliminary injunction came on for hearing on August 5, 2009 before this court. Plaintiffs, Jeffrey Herson and East Bay Outdoor, Inc. (collectively "plaintiffs") appeared through their counsel, Michael Von Loewenfeldt and Kelly A. Corcoran. Defendant City of Richmond ("the City" or "defendant") appeared through its counsel, Matthew D. Zinn. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby DENIES the motion for preliminary injunction, as stated at the hearing, and summarized as follows.

1. Plaintiffs' action, which challenges the constitutionality of certain provisions of Chapters 4.04, 15.04, and 15.06 of the City's municipal code (the "Sign Ordinance"), is moot in view of the City's July 7, 2009 adoption of Ordinance No. 19-09 N.S. (the "New Sign Ordinance"). A claim is considered moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. The basic question is "whether there exists a present controversy as to which effective relief can be granted." Vill. of Gambell v. Babbitt, 999 F.2d 403, 406 (9th Cir.1993) (internal quotation marks and citations omitted). A case should not normally be considered moot if the defendant voluntarily ceases the allegedly improper behavior in response to a suit, but is free to return

1 to it at any time.” Native Vill. of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir.1994).
2 However, “[a] statutory change... is usually enough to render a case moot, even if the
3 legislature possesses the power to reenact the statute after the lawsuit is dismissed.”
4 Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 901 (9th Cir. 2007); United
5 States v. Alaska S.S. Co., 253 U.S. 113, 116 (1920)(“Where by ... a subsequent law, the
6 existing controversy has come to an end, the case becomes moot and should be treated
7 accordingly.”). Here, the New Sign Ordinance expressly repeals Chapter 15.06 of the
8 municipal code, and under its terms, the city counsel reserves 120 days in which to “fully
9 address the constitutional questions raised about the [old] Sign Ordinance” and issue a
10 new permanent replacement ordinance. Thus, the New Sign Ordinance – which
11 temporarily and effectively terminates those portions of the Sign Ordinance with which
12 plaintiffs’ complaint takes issue – constitutes a “statutory change” sufficient to render
13 plaintiffs’ action moot.

14 2. To the extent that plaintiffs challenge this conclusion on grounds that the New
15 Sign Ordinance expressly repeals only Chapter 15.06 of the old Sign Ordinance and does
16 not moot plaintiffs’ still existing claims under Chapters 15.04 or 4.04 of the municipal code
17 (which deal with the Conditional Use Permit process), the court rejects this argument.
18 Under the old Sign Ordinance, Chapter 15.06 is defined as being “part of” Chapter 15.04,
19 and Chapter 15.06 furthermore states that its regulations are in addition to the sign code
20 “as set forth in Chapter 4.04” of the municipal code. The New Sign Ordinance codified as
21 Chapter 15.06, however, differs from the old one in that it contains no reference to any
22 other Chapters of the municipal code, including Chapters 4.04 or 15.04. Thus, it is unclear
23 whether the New Sign Ordinance even applies to Chapters 4.04 or 15.04 of the municipal
24 code, or whether plaintiffs’ challenges to those provisions are still viable.

25 3. In view of this uncertainty, the proper course of action, if plaintiffs believe
26 there is still an actionable claim under existing municipal code provisions, is for plaintiffs to
27 amend their complaint to reflect the new realities of the situation. See, e.g., Church of
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1 Scientology Flag Service Org., Inc. v. City of Clearwater, 777 F.2d 598, 605-06 (11th Cir.
2 1985)(Reversing district court decision rejecting mootness arguments and adjudicating
3 repealed ordinance)("The proper course of action would have been to allow the plaintiffs to
4 amend their complaints and proceed to litigate the ordinance then in effect").

5 4. To that end, plaintiff's action is DISMISSED on mootness grounds. Plaintiffs
6 are granted until **September 18, 2009**, however, to file an amended complaint challenging
7 those provisions of the old Sign Ordinance that plaintiffs believe are still viable, or else
8 challenging those provisions of the New Sign Ordinance that plaintiffs believe continue to
9 be infirm.

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11 **IT IS SO ORDERED.**

12 Dated: August 17, 2009



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14 PHYLLIS J. HAMILTON
15 United States District Judge
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